Law Enforcement Digest

December 2003

DECEMBER LED TABLE OF CONTENTS

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2003 LED SUBJECT MATTER INDEX

LED EDITORIAL NOTE: Our annual LED subject matter index covers all LED entries from January 2003 through December 2003. Since 1988 we have published an annual index each December. Since establishing the LED as a monthly publication in 1979, we have published three multi-year subject matter indexes. In 1989, we published a 10-year index covering LED's from January 1979 through December 1988. In 1994, we published a 5-year subject matter index covering LED's from January 1989 through December 1993. In 1999, we published a 5-year index covering LED's from January 1994 through December 1998. We plan another 5-year index in early 2004 covering 1999-2003. The 1989-1993 cumulative index, the 1994-1998 cumulative index, and monthly issues of the LED from January 1992 on are available via the "Law Enforcement Digest" link on the Criminal Justice Training Commission's Internet Home Page at: http://www.cjtc.state.wa.us. The index for 1999-2003 LEDs will be placed on the CJTC Internet LED page by December 31, 2003.

ACCOMPLICE LIABILITY (RCW 9A.08.020)

In conspiracy case involving pawnshop owner working with home-invasion robbers, court addresses issues of: (1) knowledge element of accomplice liability; (2) admissibility of co-conspirator hearsay; (3) tolling of statute of limitations for persons out of state; and (4) scope of restitution in conspiracy cases. State v. King, 113 Wn. App. 243 (Div. I, 2002) – July 03:21

ALIENS

Civil rights liability: several-hour detention of non-suspect and unjustified investigation into her citizenship violated Fourth Amendment. Mena v. City of Simi Valley, 322 F.3d 1255 (9th Cir. 2003) – Oct 03:03

ARREST, STOP AND FRISK

Citizen has constitutional right not to ID himself during Terry stop -- despite supporting Nevada statutes, Ninth Circuit holds Nevada officer is not entitled to qualified immunity for arrest based on suspect's failure to identify himself during Terry seizure. Carey v. Nevada Gaming Control Board, 279 F.3d 873 (9th Cir. 2002) – Jan 03:02

Non-pretextual vehicle stop on reasonable suspicion for "severely cracked windshield" held lawful. State v. Wayman-Burks, 114 Wn. App. 109 (Div. III, 2002) – Jan 03:11

State-conceded "seizure" of late-night sleepers in car at Denny's restaurant was not justified by "community caretaking function"; later stop for traffic violation was "fruit" of earlier unlawful "seizure." State v. Cerrillo, 114 Wn. App. 259 (Div. III, 2002) – Jan 03:14

Article: Authority to effect custodial arrest and search incident to arrest of those arrested for driving while license suspended. March 03:02

Article: How to arrest violators who refuse to sign notice of infraction. March 03:06

California officer's observation of possible "lane straddling" was not sufficient to justify car stop for a suspected DUI under "reasonable suspicion" standard. U.S. v. Colin, 314 F.3d 439 (9th Cir. 2002) – March 03:08

DWLS "arrest" under Poulsbo administrative booking policy held "custodial," and "search incident to arrest" therefore upheld. State v. Craig, 115 Wn. App. 191 (Div. II, 2002) – March 03:12

Multiple issues decided: 1) no "seizure" of person occurred in ID request and FIR questioning; 2) "plain view" justified taking "cook spoon" from car; 3) search was not "incident to arrest" because actual arrest did not occur before search; 4) consent was not voluntary where officer stated that he had independent authority to search "incident to arrest"; 5) "inevitable discovery" exception to exclusionary rule not applicable. State v. O'Neill, 148 Wn.2d 564 (2003) – April 03:03

Where 12-year-old was lawfully stopped after midnight in an isolated industrial area, "community caretaking function" held to justify officers in detaining him long enough to phone his mother. State v. Acrey, 148 Wn.2d 738 (2003) – May 03:04

In challenge to officer's basis for arrest, defendant fails to rebut presumption of reliability of DOL report which indicated that defendant had a suspended driver's license. State v. Gaddy, 114 Wn. App. 702 (Div. I, 2002) – June 03:13. Review is pending in the Washington Supreme Court.

State wins on extraterritorial "fresh pursuit" issue. Vance v. DOL, 116 Wn. App. 412 (Div. I, 2003) – June 03:15

"Reasonable suspicion" – DWLS stop upheld based on officer's knowledge of driver's license status gained in contact with suspect four days earlier. State v. Marcum, 116 Wn. App. 526 (Div. III, 2003) – June 03:19

3 a.m. trip from home to police station in boxer shorts was an "arrest;" since police lacked probable cause to arrest, confession may need to be suppressed. Kaupp v. Texas, 123 S.Ct. 1843 (2003) – July 03:19

Court holds to be unlawfully pretextual a traffic stop for lane-change violations where one motive of the officer was to investigate a possible license suspension of the driver. State v. Myers, 117 Wn. App. 93 (Div. III, 2003) – August 03:18

Asking driver to step from vehicle to determine source of alcohol smell was ok; also, search of fanny pack was consenting. State v. Mackey, 117 Wn. App. 135 (Div. III, 2003) – August 03:20

Civil rights action for unlawful arrest – 2-1 majority holds that Washington officers should have known that citizen can secretly tape record Terry stop conversation; also, under the facts, justification for arrest is limited to that actually relied on by officers at the time of arrest. Alford v. Haner, 333 F.3d 972 (9th Cir. 2003) – Sept 03:06

Division Three holds: 1) traffic stop was not per se seizure of passenger; 2) order to passenger to get out of car was justified by officer-safety concerns under Mendez; 3) subsequent questioning of passenger was not custodial equivalent of arrest, and therefore no Miranda warnings were required. State v. Rehn, 117 Wn. App. 142 (Div. III, 2003) – Sept 03:12

Arrest by Washington officers on invalid Oregon warrant held unlawful despite fact that the Washington officers did all they could do to confirm the validity of the Oregon warrant. State v. Nall, 117 Wn. App. 647 (Div. II, 2003) – Sept 03:16

Reasonable suspicion of possession of cocaine rocks justified Terry seizure. State v. Jones, 117 Wn. App. 721 (Div. I, 2003) – Sept 03:18

Extended questioning of suspect in driveway on December evening held reasonable under Terry v. Ohio; also, State loses some, wins some, on issues of "harmless error," "fruit of the poisonous tree"/"attenuation", "inevitable discovery," and gun-crime sentencing. State v. McReynolds, 117 Wn. App. 309 (Div. III, 2003) – Oct 03:14

ARSON AND RECKLESS BURNING (Chapter 9A.48 RCW)

State prevails on issues of: 1) no privacy in garbage can at neighboring abandoned house; 2) voluntariness of confession; 3) sufficiency of evidence re methamphetamine manufacturing; and 4) sufficiency of evidence re reckless burning. State v. Hepton, 113 Wn. App. 673 (Div. III, 2002) – Feb 03:15

ASSAULT (Chapter 9A.36 RCW)

Pattern of prior assaults on child that was similar to charged assault is held sufficient to support conviction for second degree assault of a child under "pattern or practice" element of the crime. State v. Schlichtmann, 114 Wn. App. 162 (Div. I, 2002) – March 03:18

Jury instructions on meaning of "disfigurement" upheld in assault-two case. State v. Atkinson, 113 Wn. App. 661 (Div. III, 2002) – March 03:20

ATTEMPT (RCW 9A.28.020)

Undercover detective's recording of internet ICQ ("I seek you") communications with suspected child molester held admissible under Privacy Act (chapter 9.73) based on implied consent by defendant; also, "impossibility" defense rejected because crime charged was attempted rape. State v. Townsend, 147 Wn.2d 666 (2002) – March 03:11

BAIL

Court rule CrRLJ 3.2(a) does not permit "cash only" bail. City of Yakima v. Mollett, 115 Wn. App. 604 (Div. III, 2003) – May 03:18

BURGLARY (Chapter 9A.52)

Burglary -- State need not show that a "fenced area" was used for lodging of persons, carrying on business, or protecting goods. State v. Wentz, 149 Wn.2d 342 (2003) – Sept 03:08

"Indecent exposure" is a "crime against a person" under burglary statute. State v. Snedden, 149 Wn.2d 914 (2003) – Oct 03:04

CIVIL LIABILITY

Loss of property due to execution of search warrant and preservation order is not "compensable taking" under article 1, section 16 of Washington State Constitution. Eggleston v. Pierce County, 148 Wn.2d 760 (2003) – May 03:11

Section 1983 civil rights action – officer's violation of Miranda or coercion of suspect's confession does not violate suspect's Fifth Amendment privilege against self-incrimination unless the suspect's statement is used in a criminal prosecution, but some such unlawful questioning may "shock the conscience" and therefore violate Fourteenth Amendment due process protections. Chavez v. Martinez, 123 S.Ct. 1994 (2003) – Sept 03:02

Civil rights action for unlawful arrest – 2-1 majority holds that Washington officers should have known that citizen can secretly tape record Terry stop conversation; also, under the facts, justification for arrest is limited to that actually relied on by officers at the time of arrest. Alford v. Haner, 333 F.3d 972 (9th Cir. 2003) – Sept 03:06 [STATUS: The State is seeking review in the U.S. Supreme Court on the second issue (i.e., alternative grounds for arrest.)

Tribal sovereignty issues resolved in county's favor in case involving county's execution of search warrant at tribal casino on reservation. Bishop Paiute Tribe v. Inyo County, California, 123 S.Ct. 1887 (2003) – Oct 03:02

Civil rights liability – several hour detention of non-suspect and unjustified investigation into her citizenship violated Fourth Amendment. Mena v. City of Simi Valley, 322 F.3d 1255 (9th Cir. 2003) – Oct 03:03

Business owner may not pursue lawsuit against City of Seattle and others in case that arose from utilities-cutoff after protestors took over a private building during the fall 1999 WTO conference. Citoli v. City of Seattle, 115 Wn. App. 459 (Div. I, 2003) – Oct 03:16

Prior guilty plea means pleading party cannot later sue for malicious prosecution on the matter that was the subject of the plea. Clark v. Baines, 114 Wn. App. 19 (Div. II, 2002) – Oct 03:21 [STATUS: review is pending in the Washington Supreme Court]

COLLATERAL ESTOPPEL

Despite prior ruling in implied consent administrative proceeding that a vehicle stop was not justified, State can litigate that same question in a subsequent DUI prosecution (in other words, "collateral estoppel doctrine" does not apply in this context). State v. Vasquez, 148 Wn.2d 303 (2002) – Feb 03:06

CRIMINAL MISTREATMENT (Chapter 9A.42 RCW)

No Miranda "custody" where suspect questioned in hospital's "family quiet room"; also, criminal mistreatment evidence sufficient. State v. Rotko; Marks, 116 Wn. App. 230 (Div. II, 2003) – June 03:07

CRUEL AND UNUSUAL PUNISHMENT

Federal constitution's prohibition against "cruel and unusual" punishment does not preclude two consecutive 25 years-to-life sentences under California "three strikes" law for man who committed two petty thefts, each of which qualified separately under California's "three strikes" law as a "third strike." Lockyer v. Andrade, 123 S.Ct. 1166 (2003) – May 03:04

Federal constitution's prohibition against "cruel and unusual" punishment does not preclude 25-years-to-life sentence under California "three strikes" law where "third strike" was felony theft of over $1000 worth of golf clubs. Ewing v. California, 123 S.Ct 1179 (2003) – May 03:04

CURFEW LAWS

City of Sumner juvenile curfew ordinance invalidated for vagueness in violation of federal constitutional due process protections. City of Sumner v. Walsh, 148 Wn.2d 490 (2002) – April 03:14

DOMESTIC VIOLENCE (INCLUDING PROTECTION ORDERS)

Evidence that man was briefly observed walking with woman protected by no-contact order was sufficient to support his conviction for violating the order. State v. Sisemore, 114 Wn. App. 75 (Div. II, 2002) – Jan 03:16

Evidence that defendant telephoned home of person protected by no-contact order and talked to person's spouse held sufficient to support conviction for violation of order. State v. Ward, 148 Wn.2d 803 (2003) – May 03:10

District Court has equitable power enabling court to issue mutual antiharassment protection orders on its own. Hough v. Stockbridge, 150 Wn.2d 234 (2003) – Nov 03:11

Restraining order issued under dissolution statute was properly worded, defendant violated the order, and defendant's violation was a class C felony. State v. Turner, 118 Wn. App 135 (Div. II, 2003) – Nov 03:20

DOUBLE JEOPARDY

"Reckless" in vehicular assault statute means driving "in a rash or heedless manner, indifferent to the consequences"; also, double jeopardy protections do not preclude multiple convictions based on multiple victims in a single vehicular assault incident. State v. Clark, 117 Wn. App. 281 (Div. II, 2003) – Oct 03:13

Extended questioning of suspect in driveway on December evening held reasonable under Terry v. Ohio; also, State loses some, wins some, on issues of "harmless error," "fruit of the poisonous tree"/"attenuation", "inevitable discovery," and gun-crime sentencing. State v. McReynolds, 117 Wn. App. 309 (Div. III, 2003) – Oct 03:14

DUE PROCESS

No constitutional due process problem under Connecticut's "Megan's Law" in not giving sex offenders pre-deprivation hearings before putting their names, addresses, pictures and descriptions on the internet. Connecticut Department of Public Safety v. Doe, 123 S.Ct. 1160 (2003) – May 03:03

Texas sodomy law directed at same-gender, consenting adult conduct held unconstitutional because not justified by legitimate state interests. Lawrence v. Texas, 123 S.Ct. 2472 (2003) – August 03:05

DOL's sending of license suspension notice to address shown on most recent traffic ticket meets constitutional due process (notice) requirement. City of Redmond v. Arroyo-Murillo, 149 Wn.2d 607 (2003) – August 03:11

Spokane prosecutor ok on policy of not plea bargaining with those who compel CI disclosure in civil forfeiture. State v. Moen, 150 Wn.2d 221 (2003) – Nov 03:12

Pre-charge investigative delay not a due process violation in adult prosecution for crime committed while a juvenile; also, child hearsay is admissible. State v. Salavea, 115 Wn. App. 52 (Div. II, 2003) – Nov 03:13

DURESS (RCW 9A.16.060)

Duress defense not available where charge is attempted murder. State v. Mannering, ___ Wn.2d ___, 75 P.3d 961 (2003) – Nov 03:11

ELECTRONIC SURVEILLANCE (Chapter 9.73 RCW)

Undercover detective's recording of internet ICQ ("I seek you") communications with suspected child molester held admissible under privacy act based on implied consent by defendant; also, "impossibility" defense rejected because crime charged was attempted rape. State v. Townsend, 147 Wn.2d 666 (2002) – March 03:11

Civil rights action for unlawful arrest – 2-1 majority holds that Washington officers should have known that citizen can secretly tape record Terry stop conversation; also, under the facts, justification for arrest is limited to that actually relied on by officers at the time of arrest. Alford v. Haner, 333 F.3d 972 (9th Cir. 2003) – Sept 03:06 [STATUS: The State is seeking review in the U.S. Supreme Court on the second issue (i.e., alternative grounds for arrest).]

ESCAPE AND RELATED OFFENSES (Chapter 9A.76 RCW)

Failure to report to drug treatment program held to be "escape." State v. Breshon, 115 Wn. App. 874 (Div. II, 2003) – May 03:23

EVIDENCE LAW

Officer's testimony commenting on defendant's pre-trial exercise of his right to silence held to require reversal of conviction. State v. Romero, 113 Wn. App. 779 (Div. III, 2002) – Jan 03:17

Hearsay from assault defendant's spouse held admissible because it meets Evidence Rule (ER) 804(b)(3) hearsay exception for "statement against interest" and meets Sixth Amendment confrontation clause test for reliability. State v. Crawford, 147 Wn.2d 424 (2002) – Feb 03:09

Before finding that frightened child rape victim was "unavailable" to testify under child-hearsay statute, trial court should have considered use of closed circuit TV. State v. Smith, 148 Wn.2d 122 (2002) – April 03:17

Evidence regarding 911 audio tape meets authentication and "excited utterance" admissibility requirements. State v. Jackson, 113 Wn. App. 762 (Div. II, 2002) – April 03:18

Test met for "dying declaration" hearsay exception. State v. Johnson, 113 Wn. App. 482 (Div. I, 2002) – April 03:22

Child victim hearsay statute receives pro-prosecution interpretation – State need not show that child was competent to testify at the time that child made hearsay statement. State v. C.J., 148 Wn.2d 672 (2003) – May 03:09

Written statement that witness gave to investigating officer could not be considered as substantive evidence because it was not made under oath or under penalty of perjury. State v. Sua, 115 Wn. App. 29 (Div. II, 2003) – May 03:20

Unsworn written statement that a DV victim gave to police held admissible as "past recorded recollection" hearsay under ER 803(a)(5) where she testified at trial and denied any memory of statement or incident. State v. Derouin, 116 Wn. App. 38 (Div. I, 2003) – May 03:21

In conspiracy case involving pawnshop owner working with home-invasion robbers, court addresses issues of: (1) knowledge element of accomplice liability; (2) admissibility of co-conspirator hearsay; (3) tolling of statute of limitations for persons out of state; and (4) scope of restitution in conspiracy cases. State v. King, 113 Wn. App. 243 (Div. I, 2002) – July 03:21

Where defendant does not raise as a question at trial his identity as the "perpetrator", evidence of defendant's prior sex crime may be admitted as reflecting a "common scheme or plan" in some circumstances where the prior sex crime does not have a unique or signature "MO." State v. DeVincentis, 150 Wn.2d 11 (2003) – Oct 03:05

"Rape shield" law at RCW 9A.44.020 does not excuse defense attorney's failure to effectively defend client – attorney should have impeached an alleged child rape victim's testimony that she had no prior sexual experience with evidence of regarding her history of having other sexual partners. State v. Horton, 116 Wn. App. 909 (Div. II, 2003) – Oct 03:20

Officer's testimony that he did not believe defendant's story was improperly admitted into evidence. State v. Jones, 117 Wn. App. 89 (Div. II, 2003) – Oct 03:21

Pre-charge investigative delay not a due process violation in adult prosecution for crime committed while a juvenile; also, child hearsay is admissible. State v. Salavea, 115 Wn. App. 52 (Div. II, 2003) – Nov 03:13

Expert testimony matching sample of dog DNA to specific dog should not have been admitted because current science does not support reliability. State v. Leuluaialii, ___ Wn. App. ___, 77 P.3d 1192 (Div. I, 2003) – Dec 03:23

EXOTIC ANIMALS

"Exotic animals" ordinance survives constitutional challenge. Rhoades v. City of Battle Ground, 115 Wn. App. 752 (Div. II, 2003) – Nov 03:21

EX POST FACTO LIMITS ON NEW STATUTES

No "ex post facto" problem under Alaska's "Megan's Law" in putting sex offenders' names, photos, descriptions and addresses on internet. Smith v. Doe, 123 S.Ct. 1140 (2003) – May 03:03

Ex post facto constitutional defect found in California law that permitted prosecution for child sex abuse even though prior statute-of-limitations period had expired. Stogner v. California, 123 S.Ct. 2446 (2003) – August 03:05

EXTORTION (RCW 9A.56.110-130)

Former extortion-two statute is given a limiting interpretation so that it does not unconstitutionally violate First Amendment free speech protections. State v. Pauling, 149, Wn.2d 381 (2003) – August 03:10

FIREARMS LAWS (Chapter 9.41 RCW)

"Armed with a deadly weapon at the time of commission of the crime" sentencing provision receives conflicting interpretations in split decision favoring the State. State v. Schelin, 147 Wn.2d 562 (2002) – Feb 03:07

Federal courts cannot restore federal firearms rights where congressional appropriation bars BATF from doing so. U.S. v. Bean, 123 S.Ct. 584 (2002) – March 03:07

Possession of firearms at time person commits or is arrested for felony justifies forfeiture of firearms under RCW 9.41.098(1)(d). State v. Cramm, 114 Wn. App. 170 (Div. I, 2002) – March 03:17

Person convicted of Class A sex offense may not petition for restoration of firearms rights even if he has no prior convictions. State v. Graham, 116 Wn. App. 185 (Div. II, 2003) – May 03:15

Courts have no discretion to not restore gun rights under RCW 9.41.040(4). State v. Swanson, 116 Wn. App. 67 (Div. II, 2003) – May 03:17

Under RCW 9.41.040, Washington conviction of indecent liberties bars possession of firearms for life unless governor pardons or annuls. Smith v. State, __ Wn. App. __, 76 P.3d 769 (Div. III, 2003) – Nov 03:16

FISH AND WILDLIFE CRIMES, VIOLATIONS (Title 77 RCW)

Strict liability applied where prosecution under former commercial fishing statute was based upon possession of more than three times the personal bag limit of geoducks. State v. Mertens, 148 Wn.2d 820 (2003) – May 03:11 NOTE: The statute addressed in this case has sine been amended. See **June 02 LED** at pages 4-5.

FREEDOM OF SPEECH

Virginia's cross-burning statute partially stricken, partially validated in "free speech" challenge. Virginia v. Black, 123 S.Ct. 1536 (2003) – August 03:04

Former extortion-two statute is given a limiting interpretation so that it does not unconstitutionally violate First Amendment free speech protections. State v. Pauling, 149 Wn.2d 381 (2003) – August 03:10

Adult cabaret ordinance held constitutional in free speech, voidness attack. Heesan Corporation v. City of Lakewood, ____ Wn. App. ____, 75 P.3d 1003 (Div. II. 2003) – Dec 03:23

HARASSMENT (Chapter 9A.46 RCW) (see also "Malicious Harassment")

Threat-to-kill felony harassment evidence held sufficient to support conviction even though target did not fear death. State v. C.G., 114 Wn. App. 101 (Div. I, 2002) – Jan 03:18 [Status: Review is pending in the Washington Supreme Court]

Felony harassment conviction of juvenile who threatened at school to "do like Columbine" upheld against his free speech and statute-based challenges. State v. E.J.Y., 113 Wn. App. 940 (Div. I, 2002) – Jan 03:20

District Court has equitable power enabling court to issue mutual antiharassment protection orders on its own. Hough v. Stockbridge, 150 Wn.2d 234 (2003) – Nov 03:11

IMPLIED CONSENT (RCW 46.20.308)

Actual temperature of simulator solution need not be proven in order to meet WAC rule's foundational requirement for admissibility of breath test results. City of Seattle v. Allison, 148 Wn.2d 75 (2002) – Feb 03:03

Despite prior ruling in implied consent administrative proceeding that a vehicle stop was not justified, State can litigate that same question in a subsequent DUI prosecution (in other words, "collateral estoppel doctrine" does not apply in this context). State v. Vasquez, 148 Wn.2d 303 (2002) – Feb 03:06

IMPOSSIBILITY DEFENSE

Undercover detective's recording of internet ICQ ("I seek you") communications with suspected child molester held admissible under Privacy Act (chapter 9.73 RCW) based on implied consent by defendant; also, "impossibility" defense rejected because crime charged was attempted rape. State v. Townsend, 147 Wn.2d 666 (2002) – March 03:11

INDECENT EXPOSURE (RCW 9A.88. 010)

"Indecent exposure" is a "crime against a person" under burglary statute. State v. Snedden, 149 Wn.2d 914 (2003) – Oct 03:04

INDIANS (NATIVE AMERICANS)

Tribal sovereignty issues resolved in county's favor in case involving county's execution of search warrant at tribal casino on reservation. Bishop Paiute Tribe v. Inyo County, California, 123 S.Ct. 1887 (2003) – Oct 03:02

INSANITY DEFENSE (RCW 9A.12.010)

Insanity instructions in "deific decree" case held sufficient even though the instructions did not define "right" and "wrong." State v. Applin, 116 Wn. App. 818 (Div. I, 2003) – Oct 03:18

INSURANCE

Tenant's operation of methamphetamine lab in rental house was "vandalism" covered under the landlord's insurance policy. Graff v. Allstate Insurance Company, 113 Wn. App. 799 (Div. II, 2002) – Jan 03:22

INTERROGATIONS AND CONFESSIONS

Supreme Court validates its own rules that require warning of right to counsel immediately following custodial arrest, regardless of Miranda applicability; but violation of rule through improperly worded warning is held harmless under facts of cases at issue because not prejudicial. State v. Templeton, 148 Wn.2d 193 (2002) – Feb 03:03

Non-commissioned city security guards investigating marijuana smokers held to be "state actors" required to give Miranda warnings; also, circumstances of questioning held to be "custodial arrest" equivalent. State v. Heritage, 114 Wn. App. 591 (Div. III, 2002) – Feb 03:10 [Status: Review is pending in the Washington Supreme Court]

State prevails on issues of: 1) no privacy in garbage can at neighboring abandoned house; 2) voluntariness of confession; 3) sufficiency of evidence regarding methamphetamine manufacturing; and 4) sufficiency of evidence regarding reckless burning. State v. Hepton, 113 Wn. App. 673 (Div. III, 2002) – Feb 03:15

No "custody" for purposes of Miranda warnings requirement where questioning occurred during Terry stop of suspected car thief. State v. Cunningham, 116 Wn. App. 219 (Div. III, 2003) – June 03:05

No Miranda "custody" where suspect questioned in hospital's "family quiet room"; also, criminal mistreatment evidence sufficient. State v. Rotko; Marks, 116 Wn. App. 230 (Div. II, 2003) – June 03:07

Where officer decided during un Mirandized interrogation that officer was not going to allow suspect to leave, but officer did not communicate his decision to suspect, officer's uncommunicated decision was not relevant to "custody" issue; also, totality of circumstances did not add up to custody. State v. Solomon, 114 Wn. App. 781 (Div. III, 2002) – June 03:10

Division Three holds: 1) traffic stop was not per se seizure of passengers; 2) order to passenger to get out of car was justified by officer-safety concerns under Mendez; 3) subsequent questioning of passenger was not custodial equivalent of arrest, and therefore no Miranda warnings were required. State v. Rehn, 117 Wn. App. 142 (Div. III, 2003) – Sept 03:12

Even if initial, pre-Mirandized questioning violated Miranda, subsequent Mirandized interrogation results were admissible. State v. Reed, 116 Wn. App. 418 (Div. III, 2003) – Sept. 03:19

During custodial interrogation, right to silence can be asserted by continuing silence in the face of persistent questioning for extended time, but facts of case do not support theory. State v. Hodges, ___ Wn. App. ___, 77 P.3d 1375 (Div. I, 2003) – Dec 03:16

Murder suspect's statements to detectives held to be voluntary. State v. Hughes, ___ Wn. App. ___, 77 P.3d 681 (Div. II, 2003) – Dec 03:20

LEGISLATIVE UPDATES 2003

2003 LEGISLATIVE UPDATE -- PART ONE – April 03:02

2003 LEGISLATIVE UPDATE – PART TWO - June 03:02

2003 LEGISLATIVE UPDATE – PART THREE – July 03:01

2003 LEGISLATIVE UPDATE – PART FOUR (INDEX) - August 03:02

LINEUPS, SHOWUPS AND PHOTO ID PROCEDURES

Affidavit establishes informant-based probable cause to search (hypertechnical challenges to PC rejected, including claim that the informant's basis of knowledge was not shown); also, photo ID procedure held not to be impermissibly suggestive. State v. Vickers, 148 Wn.2d 91 (2002) – April 03:15

MALICIOUS HARASSMENT (RCW 9A.36.080)

Evidence held sufficient to support woman-hating defendant's conviction for malicious harassment of female police officer. State v. Johnson, 115 Wn. App. 890 (Div. III, 2003) – May 03:21

Virginia's cross-burning statute partially stricken, partially validated in "free speech" challenge. Virginia v. Black, 123 S.Ct. 1536 (2003) – August 03:04

MURDER AND OTHER CRIMINAL HOMICIDES (Chapter 9A.32 RCW)

Evidence held sufficient to support conviction for homicide by abuse. State v. Madarash, 115 Wn. App. 500 (Div. II, 2003) – Oct 03:19

PLEA BARGAINING

Banishment for 1 year from 4 counties upheld because it was part of a plea bargain. State v. Phelps, 113 Wn. App. 347 (Div. II, 2002) – Jan 03:21

SEARCH AND SEIZURE

Community Caretaking Exception

Warrantless search of trailer held unlawful because search was investigatory, not "community caretaking," and was not justified by exigent circumstances or by consent. State v. Schlieker, 115 Wn. App. 264 (2003) – May 03:12

State loses on issues of 1) "automatic standing;" 2) impound authority over 5th wheel trailer; 3) "community caretaking;" and 4) implied consent by virtue of report of stolen vehicle. State v. Kypreos, 115 Wn. App. 207 (Div. I, 2003) – June 03:16

Computer Search and Seizure

Computer searches and seizures – link provided to federal DOJ guide.

Consent

Multiple issues decided: 1) no "seizure" of person occurred in ID request and FIR questioning; 2) "plain view" justified taking "cook spoon" from car; 3) search was not "incident to arrest" because actual arrest did not occur before search; 4) consent was not voluntary where officer stated that he had independent authority to search "incident to arrest"; 5) "inevitable discovery" exception to exclusionary rule not applicable. State v. O'Neill, 148 Wn.2d 564 (2003) – April 03:03

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Officers need not give Ferrier warnings if asking for consent to enter residence only to talk to a suspect (not to search). State v. Khounvichai, 149 Wn.2d 557 (2003) – August 03:06

Apartment tenant did not have actual or apparent authority to consent to search of guest's eyeglass case. State v. Rison, 116 Wn. App. 955 (Div. III, 2003) – August 03:11

Employer Authority To Search For Non-Criminal Investigation Reasons

City employer's cooperation with FBI's criminal search does not qualify the search as a non-investigatory employer search. U.S. v. Jones, 286 F.3d 1146 (9th Cir. 2002) – March 03:10

Entry of Residence to Arrest

Entry of residence to arrest on warrant: Payton's "reason to believe" standard for determining presence of suspect held identical to "probable cause" standard. U.S. v. Gorman, 314 F.3d 1105 (9th Cir. 2002) – March 03:10

Exclusionary Rule (see also subtopics "Independent Source"; "Inevitable Discovery")

State-conceded "seizure" of late-night sleepers in car at Denny's restaurant was not justified by "community caretaking function"; later stop for traffic violation was "fruit" of earlier unlawful "seizure." State v. Cerrillo, 114 Wn. App. 259 (Div. III, 2002) – Jan 03:14

Multiple issues decided: 1) no "seizure" of person occurred in ID request and FIR questioning; 2) "plain view" justified taking "cook spoon" from car; 3) search was not "incident to arrest" because actual arrest did not occur before search; 4) consent was not voluntary where officer stated that he had independent authority to search "incident to arrest"; 5) "inevitable discovery" exception to exclusionary rule not applicable. State v. O'Neill, 148 Wn.2d 564 (2003) – April 03:03

Extended questioning of suspect in driveway on December evening held reasonable under Terry v. Ohio; also, state loses some, wins some, on issues of "harmless error," "fruit of the poisonous tree"/"attenuation", "inevitable discovery," and gun-crime sentencing. State v. McReynolds, 117 Wn. App. 309 (Div. III, 2003) – Oct 03:14

Impound-Inventory Exception

Impound ordinances or WAC rules adopted under authority of RCW 46.55.113 provisions relating to vehicles driven by suspended, revoked drivers must allow officers to consider reasonable alternatives to impoundment. All Around Underground, Inc. v. WSP, 148 Wn.2d 145 (2002) – Feb 03:02

State loses on issues of 1) "automatic standing;" 2) impound authority over 5th wheel trailer; 3) "community caretaking;" and 4) implied consent by virtue of report of stolen vehicle. State v. Kypreos, 115 Wn. App. 207 (Div. I, 2003) – June 03:16

Impound of car under city ordinance mandating impound of cars of drivers with suspended licenses held to violate RCW 46.55.113; also towing and other fees, but not loss-of-use damages, recoverable under statute's "good faith" provision; attorney fees held not recoverable. In re 1992 Honda Accord, 117 Wn. App. 510 (Div. III, 2003) – Sept 03:21

Incident to Arrest (Motor Vehicle)

Article: Authority to effect custodial arrest and search incident to arrest of those arrested for driving while license suspended. March 03:02

DWLS "arrest" under Poulsbo administrative booking policy held "custodial," and "search incident to arrest" therefore upheld. State v. Craig, 115 Wn. App. 191 (Div. II, 2002) – March 03:12

Vehicle and arrest must have close physical connection and time connection to justify MV search incident to arrest: despite factual finding that driver-side door of pickup truck was open and that arrestee was located on that side of his truck at time that arrest occurred, a further finding specifying only that arrestee was "near" his truck at time of arrest fails to support "search incident." State v. Turner, 114 Wn. App. 653 (Div. II, 2002) – March 03:15

Multiple issues decided: 1) no "seizure" of person occurred in ID request and FIR questioning; 2) "plain view" justified taking "cook spoon" from car; 3) search was not "incident to arrest" because actual arrest did not occur before search; 4) consent was not voluntary where officer stated that he had independent authority to search "incident to arrest"; 5) "inevitable discovery" exception to exclusionary rule not applicable. State v. O'Neill, 148 Wn.2d 564 (2003) – April 03:03

"Independent Source" Exception To Exclusionary Rule

Because initial observation of marijuana patch from adjoining property was lawful and provided "independent source" for search warrant, follow-up unlawful intrusion onto property did not require suppression of evidence subsequently seized under warrant. State v. Smith (Greg and Dina), 113 Wn. App. 846 (Div. III, 2002) – Jan 03:09

Inevitable Discovery Exception To Exclusionary Rule

Multiple issues decided: 1) no "seizure" of person occurred in ID request and FIR questioning; 2) "plain view" justified taking "cook spoon" from car; 3) search was not "incident to arrest" because actual arrest did not occur before search; 4) consent was not voluntary where officer stated that he had independent authority to search "incident to arrest"; 5) "inevitable discovery" exception to exclusionary rule not applicable. State v. O'Neill, 148 Wn.2d 564 (2003) – April 03:03

Extended questioning of suspect in driveway on December evening held reasonable under Terry v. Ohio; also, State loses some, wins some, on issues of "harmless error," "fruit of the poisonous tree"/"attenuation", "inevitable discovery," and gun-crime sentencing. State v. McReynolds, 117 Wn. App. 309 (Div. III, 2003) – Oct 03:14

Particularity Requirement

Search under warrant of meth dealer's residence upheld: 1) Thein's residence-nexus probable cause test met; 2) warrant was overbroad but severable; 3) officers' delay in serving warrant until 10th day after issuance did not result in dissipation of probable cause. State v. Maddox, 116 Wn. App. 796 (Div. II, 2003) – Oct 03:06

Plain View Authority To Seize

Multiple issues decided: 1) no "seizure" of person occurred in ID request and FIR questioning; 2) "plain view" justified taking "cook spoon" from car; 3) search was not "incident to arrest" because actual arrest did not occur before search; 4) consent was not voluntary where officer stated that he had independent authority to search "incident to arrest"; 5) "inevitable discovery" exception to exclusionary rule not applicable. State v. O'Neill, 148 Wn.2d 564 (2003) – April 03:03

Privacy Expectations, Scope Of Constitutional Protections

Random checking of license plates and obtaining DOL information does not violate the Washington constitution's article one, section seven. State v. McKinney, 148 Wn.2d 20 (2002) – Jan 03:05

State prevails on issues of: 1) no privacy in garbage can at neighboring abandoned house; 2) voluntariness of confession; 3) sufficiency of evidence re methamphetamine manufacturing; and 4) sufficiency of evidence re reckless burning. State v. Hepton, 113 Wn. App. 673 (Div. III, 2002) – Feb 03:15

Strip search inside police van under warrant to search drug dealer's person held: 1) supported by probable cause and 2) reasonably executed. State v. Hampton, 114 Wn. App. 486 (Div. II, 2002) – Feb 03:19

Prescription drug records may, per Washington state statute and per federal and state constitutions, be inspected by pharmacy board or law officers, and that information may be passed on to prosecutor. Murphy v. State, 115 Wn. App. 297 (Div. I, 2003) – April 03:20

Under Washington constitution, article 1, section 7, search warrant required for police use of GPS device; but warrant affidavit held to establish probable cause, so state prevails. State v. Jackson, ___ Wn.2d ___, 76 P.3d 217 (2003) – Nov 03:02

Probable Cause

Strip search inside police van under warrant to search drug dealer's person held: 1) supported by probable cause and 2) reasonably executed. State v. Hampton, 114 Wn. App. 486 (Div. II, 2002) – Feb 03:19

Affidavit establishes informant-based probable cause to search (hypertechnical challenges to PC rejected, including claim the informant's basis of knowledge was not shown); also, photo ID procedure held not impermissibly suggestive. State v. Vickers, 148 Wn.2d 91 (2002) – April 03:15

CI-based probable cause found in rejection of meth defendant's challenge to probable cause support for search warrant. State v. Shaver, 116 Wn. App. 375 (Div. III, 2003) – June 03:21

Thein residence-nexus probable cause test met for search of outdoor marijuana grower's residence; also, trial court was required to impose mandatory $1000 fine under RCW 69.50.430(1). State v. Cowin, 116 Wn. App. 752 (Div. II, 2003) – August 03:14

Search under warrant of meth dealer's residence upheld: 1) Thein's residence-nexus probable cause test met; 2) warrant was overbroad but severable; 3) officers' delay in serving warrant until 10th day after issuance did not result in dissipation of probable cause. State v. Maddox, 116 Wn. App. 796 (Div. II, 2003) – Oct 03:06

Under Washington constitution, article 1, section 7, search warrant required for police use of GPS device; but warrant affidavit held to establish probable cause, so state prevails. State v. Jackson, ___ Wn.2d ___, 76 P.3d 217 (2003) – Nov 03:02

Protective Sweeps

Where officers were executing search warrant authorizing arrest of resident on felony warrants, and officers had already made arrest, "protective sweep" of outbuildings was not justified. State v. Hopkins, State v. Smith (Russell A.) 113 Wn. App. 954 (Div. III, 2002) – Jan 03:06

Scope Of Search Under Warrant

Strip search inside police van under warrant to search drug dealer's person held: 1) supported by probable cause and 2) reasonably executed. State v. Hampton, 114 Wn. App. 486 (Div. II, 2002) – Feb 03:19

Standing

State loses on issues of 1) "automatic standing;" 2) impound authority over 5th wheel trailer; 3) "community caretaking;" and 4) implied consent by virtue of report of stolen vehicle. State v. Kypreos, 115 Wn. App. 207 (Div. I, 2003) – June 03:16

SENTENCING (INCLUDING RESTITUTION)

"Armed with a deadly weapon at the time of commission of the crime" sentencing provision receives conflicting interpretations in split decision favoring the state. State v. Schelin, 147 Wn.2d 562 (2002) – Feb 03:07

Federal constitution's prohibition against "cruel and unusual" punishment does not preclude two consecutive 25 years-to-life sentences under California "three strikes" law for man who committed two petty thefts, each of which qualified separately under California's "three strikes" law as a "third strike." Lockyer v. Andrade, 123 S.Ct. 1166 (2003) – May 03:04

Federal constitution's prohibition against "cruel and unusual" punishment does not preclude 25-years-to-life sentence under California "three strikes" law where "third strike" was felony theft of over $1000 worth of golf clubs. Ewing v. California, 123 S.Ct 1179 (2003) – May 03:04

In conspiracy case involving pawnshop owner working with home-invasion robbers, court addresses issues of: (1) knowledge element of accomplice liability; (2) admissibility of co-conspirator hearsay; (3) tolling of statute of limitations for persons out of state; and (4) scope of restitution in conspiracy cases. State v. King, 113 Wn. App. 243 (Div. I, 2002) – July 03:21

Juvenile court not permitted to order restitution for victim counseling where crime is not a sex offense. State v. J. P., 149 Wn.2d 444 (2003) – August 03:10

Thein residence-nexus probable cause test met for search of outdoor marijuana grower's residence; also, trial court was required to impose mandatory $1000 fine under RCW 69.50.430(1). State v. Cowin, 116 Wn. App. 752 (Div. II, 2003) – August 03:14

Extended questioning of suspect in driveway on December evening held reasonable under Terry v. Ohio; also, State loses some, wins some, on issues of "harmless error," "fruit of the poisonous tree"/"attenuation", "inevitable discovery," and gun-crime sentencing. State v. McReynolds, 117 Wn. App. 309 (Div. III, 2003) – Oct 03:14

"Same criminal conduct" gets narrow, pro-prosecution interpretation in child pornography sentencing. State v. Ehli, 115 Wn. App. 556 (Div. III, 2003) – Oct 03:20

Sentencing court's powers and limitations under SRA regarding community custody conditions addressed. State v. Jones, __ Wn. App. __, 76 P.3d 258 (Div. II, 2003) – Nov 03:19

SEX OFFENDER REGISTRATION (RCW 9A.44.130-145)

No "ex post facto" problem under Alaska's "Megan's Law" in putting sex offenders' names, photos, descriptions and addresses on the internet. Smith v. Doe, 123 S.Ct. 1140 (2003) – May 03:03

No due process problem under Connecticut's "Megan's Law" in not giving sex offenders pre-deprivation hearings before putting their names, addresses, pictures and descriptions on the internet. Connecticut Department of Public Safety v. Doe, 123 S.Ct. 1160 (2003) – May 03:03

SEX OFFENSES (Chapter 9A.44.RCW)

Texas sodomy law directed at same-gender, consenting adult conduct held unconstitutional because not justified by legitimate state interests. Lawrence v. Texas, 123 S.Ct. 2472 (2003) – August 03:05

SPEEDY TRIAL

Speedy trial/speedy arraignment rule not violated where marijuana-growing prosecution was delayed after defendant was arraigned on DV assault charge, despite fact police learned about both crimes during same DV police response. State v. Kindsvogel, 149 Wn.2d 477 (2003) – Sept 03:11

STATUTE OF LIMITATIONS (RCW 9A.04.080)

In conspiracy case involving pawnshop owner working with home-invasion robbers, court addresses issues of: (1) knowledge element of accomplice liability; (2) admissibility of co-conspirator hearsay; (3) tolling of statute of limitations for persons out of state; and (4) scope of restitution in conspiracy cases. State v. King, 113 Wn. App. 243 (Div. I, 2002) – July 03:21

Ex post facto constitutional defect found in California law that permitted prosecution for child sex abuse even though prior statute-of-limitations period had expired. Stogner v. California, 123 S.Ct. 2446 (2003) – August 03:05

TAX CRIMES (State Or Local Taxes)

Evidence held sufficient to convict "short-dropping" petroleum-truck driver of theft; also, because his fuel tax evasion offense was a "continuing crime," the statute of limitations did not begin to run for that crime until the criminal scheme was completed. State v. Greathouse, 113 Wn. App. 889 (Div. I, 2002) – Nov 03:17

THEFT (Chapter 9A.56 RCW)

Evidence held sufficient to convict "short-dropping" petroleum-truck driver of theft; also, because his fuel tax evasion offense was a "continuing crime," the statute of limitations did not begin to run for that crime until the criminal scheme was completed. State v. Greathouse, 113 Wn. App. 889 (Div. I, 2002) – Nov 03:17

TRAFFIC (Title 46 RCW) (See also "Implied Consent")

Under "physical control" statute's defense for moving vehicle off roadway, defendant need not have moved vehicle while intoxicated. Belasco v. City of Tacoma, 114 Wn. App. 211 (Div. II, 2002) – Jan 03:12

Under "safely off the roadway" defense to charge of "physical control," the defendant need not be the person who did the moving. State v. Votava, 149 Wn.2d 178 (2003) – August 03:10

DOL's sending of license suspension notice to address shown on most recent traffic ticket meets constitutional due process (notice) requirement. City of Redmond v. Arroyo-Murillo, 149 Wn.2d 607 (2003) – August 03:11

"Reckless" in vehicular assault statute means driving "in a rash or heedless manner, indifferent to the consequences"; also, double jeopardy protections do not preclude multiple convictions based on multiple victims in a singular vehicular assault incident. State v. Clark, 117 Wn. App. 281 (Div. II, 2003) – Oct 03:13

UNIFORM CONTROLLED SUBSTANCES ACT (and Other Drug Laws) (including Chapter 69.50 RCW)

Lack of medical license is not an element of the crime of unlawful delivery of legend drugs in violation of RCW 69.41.030. State v. Clausing, 147 Wn.2d 620 (2002) – Feb 03:08

State prevails on issues of: 1) no privacy in garbage can at neighboring abandoned house; 2) voluntariness of confession; 3) sufficiency of evidence regarding methamphetamine manufacturing; and 4) sufficiency of evidence regarding reckless burning. State v. Hepton, 113 Wn. App. 673 (Div. III, 2002) – Feb 03:15

Prescription drug records may, per Washington state statute and per federal and state constitutions, be inspected by Pharmacy Board or law officers, and that information may be passed on to prosecutor. Murphy v. State, 115 Wn. App. 297 (Div. I, 2003) – April 03:20

Thein residence-nexus probable cause test met for search of outdoor marijuana grower's residence; also, trial court was required to impose mandatory $1000 fine under RCW 69.50.430(1). State v. Cowin, 116 Wn. App. 752 (Div. II, 2003) – August 03:14

"Medical use of marijuana act": qualified patient's after-the-fact designation of person as "primary caregiver" does not meet statutory requirement. State v. Phelps, ___ Wn. App. ___, 77 P.3d 678 (Div. II, 2003) – Dec 03:18

VOID-FOR-VAGUENESS DOCTRINE

City of Sumner juvenile curfew ordinance invalidated for vagueness that violates federal constitutional due process protections. City of Sumner v. Walsh, 148 Wn.2d 490 (2002) – April 03:14

Adult cabaret ordinance held constitutional in free speech, voidness attack. Heesan Corporation v. City of Lakewood, ____ Wn. App. ____, 75 P.3d 1003 (Div. II. 2003) – Dec 03:23

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COMPUTER SEARCHES AND SEIZURES – LINK PROVIDED TO FEDERAL DOJ GUIDE

The Criminal Justice Training Commission has added to the materials on its **LED** page [http://www.cjtc.state.wa.us/ledpage.html] a link to "Searching and seizing computers and obtaining electronic evidence in criminal investigations," from the U.S. Department of Justice. The Federal DOJ materials may be directly accessed at: [http://www.cybercrime.gov/s&smanual2002.htm].

Because Washington law differs in some respects from federal law, local and state officers in Washington must be cautions in using federal materials. Nonetheless, these comprehensive federal material are very useful for all law enforcement officers dealing with computer-search questions.

As always, we urge officers to consult their agency legal advisors and local prosecutors on legal questions.

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WASHINGTON STATE COURT OF APPEALS

DURING CUSTODIAL INTERROGATION, RIGHT TO SILENCE CAN BE ASSERTED BY CONTINUING SILENCE IN THE FACE OF PERSISTENT QUESTIONING FOR EXTENDED TIME, BUT FACTS OF CASE DO NOT SUPPORT THEORY

State v. Hodges, ___ Wn. App. ___, 77 P.3d 375 (Div. I, 2003)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> Hodges broke into the home of Hadi al-Sadoon as al-Sadoon was showering. When al-Sadoon found Hodges in his living room, he screamed, "Get out!" Al-Sadoon then chased Hodges out of the house and tackled him in his neighbor's yard. During the tussle, Hodges reached inside his coat and handed al-Sadoon his wallet, saying, "Here, here, I will give it to you." Seattle Police Officers Hughey and Diamond arrived shortly thereafter and took Hodges into custody. Hodges was charged with residential burglary.

At the CrR 3.5 hearing, Officer Hughey, the first officer to interact with Hodges, testified that he read Hodges his Miranda rights, and that Hodges stated that he understood his rights. Hodges then admitted to knocking on al- Sadoon's door, and upon hearing no response, entered the home. But when Hughey asked Hodges, "what happened next?" Hodges did not answer. Believing that Hodges would no longer cooperate, Officer Hughey left to run Hodges' information through the police database, leaving Hodges with Officer Diamond. Diamond placed Hodges in his patrol car and proceeded to question him, eliciting an admission that Hodges had entered the house and did not have permission to do so. Hodges' statements were ruled admissible.

At trial, Hodges presented a defense of diminished capacity. The critical issue at trial was whether Hodges was capable of forming the intent to commit the charged crime. The jury rejected the defense, and Hodges was found guilty as charged.

ISSUE AND RULING: 1) Can mere silence in the face of persistent police questioning over an extended time period ever constitute the assertion of the right to silence under Miranda? (ANSWER: Yes); 2) Did defendant Hodges assert his Miranda right to silence when he did not respond to the officer's question, "What happened next?" (ANSWER: No, because the officer did not persist in questioning for an extended period)

Result: Affirmance of King County Superior Court conviction of Richard Edward Hodges for residential burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Hodges argues that his refusal to answer Hughey's question, "what happened next," was an assertion of his right to remain silent, and that all subsequent questioning should have ceased. The State counters that silence alone can never invoke one's right to remain silent. We conclude that the right to remain silent can be invoked by remaining silent when, under the totality of the circumstances, the invocation is clear and unequivocal.

No Washington case has addressed this issue. The State argues that we should follow the rationale articulated in Davis v. United States, 512 U.S. 452 (1994) **Sept 94 LED:02** regarding the right to counsel. In Davis, the Court held that a defendant must clearly articulate his desire for an attorney to invoke the right to counsel under Miranda. Several other jurisdictions have held that Davis's clear articulation rule applies as well to the right to remain silent. In Evans v. Demosthenes, 902 F. Supp. 1253 (D. Nev. 1995) the court rejected the defendant's claim that his initial failure to respond was an assertion of his right to remain silent:

> W]e conclude that the court of appeals, in light of the Supreme Courts subsequent decision in Davis, would extend Davis's clear articulation rule to the right to remain silent; that, because [the accused] never clearly invoked that right, [the officer] was free to interrogate him; and that [the accuseds] confession, as the product of that interrogation, was therefore properly admitted.

We are not persuaded by these decisions. In our view, it is possible to invoke the right to remain silent by remaining silent. But we disagree with Hodges' position that by simply not answering an officer's question, the right to remain silent is invoked. In United States v. Wallace, 848 F.2d 1464 (9th Cir. 1988) the defendant maintained her silence for several minutes and, perhaps, as many as

> ten minutes in the face of repeated questioning by the police. The Wallace court ruled that her subsequent statements were inadmissible because the Supreme Court in Miranda warned that " 'a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.' " The court held that the officer's questioning, after Wallace's initial refusal to respond, violated an express directive of Miranda: " 'If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.' "
>
> We find the analysis in Wallace persuasive. Silence in the face of repeated questioning over a period of time may constitute an invocation of the right to remain silent. The right to remain silent need not be articulated so long as it is clear and unequivocal.
>
> Nevertheless, Hodges' failure to respond to Hughey's question was not a clear and unequivocal invocation of his right to remain silent. He did not answer the question, "what happened next," but shortly thereafter answered a different officer's question without hesitation. Hodges therefore failed to invoke his Miranda rights, and Diamond was free to continue to question him. The trial court did not abuse its discretion in admitting Hodges' statements.

[Some citations and footnotes omitted]

LED EDITORIAL NOTE AND COMMENT:

1) "INITIATION OF CONTACT" ARTICLE ON CJTC WEBPAGE HAS BEEN UPDATED.

The Hodges decision has been incorporated in Assistant Attorney General John Wasberg's article – "'Initiation of Contact' Rules Under Fifth and Sixth Amendments" – on the "Law Enforcement Digest" page on the Criminal Justice Training Commission's website. The CJTC LED-page link is [http://www.//www.cjtc.state.wa.us/led/ledpage.html]

2) WHAT SHOULD OFFICERS DO WHEN A SUSPECT IN AN INTERROGATION SETTING GOES SILENT?

Whether a suspect goes silent a) immediately after being read the Miranda warnings or b) during interrogation after having previously waived his or her rights, the interrogating officer would be well-advised, in ceasing interrogation efforts, to say something along the following lines: "It looks like you want to take a break. We will get back to you in a little while." Then, in an abundance of caution, if interrogation efforts are resumed after waiting a reasonable period of time, any officer re-initiating contact probably should re-Mirandize and seek an express waiver.

For a discussion of the many issues presented in "initiation of contact" situations under the Fifth and Sixth Amendments of the U.S. Constitution, see the article on the CJTC LED page referenced above in our first Note/Comment.

"MEDICAL USE OF MARIJUANA ACT": QUALIFIED PATIENT'S AFTER-THE-FACT DESIGNATION OF PERSON AS "PRIMARY CAREGIVER" DOES NOT MEET STATUTORY REQUIREMENT

State v. Phelps, ___ Wn. App. ___, 77 P.3d 678 (Div. II, 2003)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> United Parcel Service (UPS) attempted to deliver a package addressed to Larry Phelps at 2234 McDonnell Creek Road. Unable to find such an address, UPS delivered the package to a Larry Phelps at 213 Crabs Road. The package contained marijuana, prompting Larry Phelps on Crabs Road to call the sheriff.

The sheriff investigated and found a Larry Phelps residing at 223 McDonald Creek Road. Undercover officers arranged to deliver the package to Phelps, who lived on the property with his foster father, Robert Clark. Clark suffered from glaucoma and was authorized to use marijuana for medical purposes.

The undercover officers approached Phelps at his residence and had him identify the package. Phelps repeatedly said, "It's mine," and offered to show the officers his identification. The officers then arrested Phelps.

On November 16, 2001, the State charged Phelps with attempt to possess marijuana under RCW 69.50.401(d) and RCW 69.50.407. Clark designated Phelps as his primary caregiver on March 5, 2002.

The State moved to prevent Phelps from presenting evidence that he could lawfully possess marijuana as the designated primary caregiver for a medical marijuana patient, an affirmative defense under Washington's Medical Marijuana Act, Chapter 69.51A RCW. The court granted the State's motion after concluding that the statute required a patient to designate the primary caregiver in writing before the caregiver could possess marijuana.

ISSUE AND RULING: Under Washington's "Medical Use of Marijuana Act," chapter 69.51A RCW, does a qualified patient's designation of a person as a "primary caregiver" after that person has already been discovered in possession of marijuana qualify that designated person to possess marijuana under the Act? (ANSWER: No)

Result: Affirmance of Clallam County Superior Court conviction of Larry D. Phelps for attempt to possess marijuana.

ANALYSIS: (Excerpted from Court of Appeals opinion)

RCW 69.50.401(d) makes it unlawful to possess marijuana, a Schedule I controlled substance. RCW 69.50.204(c)(14). It is also unlawful to attempt to possess marijuana. RCW 69.50.407. A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020(1).

The Medical Use of Marijuana Act (Act) provides an affirmative defense for patients and caregivers charged with possessing marijuana. RCW 69.51A.005; State v. Shepherd, 110 Wn. App. 544 (2002) **May 02 LED:08**. Under the Act, qualifying patients with terminal or debilitating illnesses who, in their physician's judgment, would benefit from the medical use of marijuana, may not be found guilty for their possession and limited use of marijuana. RCW 69.51A.005. Persons who act as primary caregivers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana. RCW 69.51A.005. A primary caregiver, however, must be "designated in writing by a patient to perform the duties of primary caregiver under this chapter." RCW 69.51A.010(2)(c).

Furthermore, the Act requires "valid documentation" to prove the affirmative defense. Thus, a defendant is required to show by a preponderance of the evidence that he or she has met the requirements of the Act in order to raise an affirmative defense against criminal prosecution.

On November 16, 2001, the State charged Phelps with attempt to possess marijuana under RCW 69.50.401(d) and RCW 69.50.407. Phelps offered to prove that his foster father designated him a primary caregiver in writing on

March 5, 2002. The trial court precluded Phelps from presenting the evidence, ruling that the Act required such written designation before his attempted possession and arrest.

Under RCW 69.51A.010, a primary caregiver is one who "[h]as been designated in writing by a patient to perform the duties of primary caregiver." And under RCW 69.51A.040(4)(c), the designated primary caregiver must be able to "[p]resent a copy of the qualifying patient's valid documentation required by this chapter, as well as evidence of designation to act as primary caregiver by the patient, to any law enforcement official requesting such information."

Phelps agrees that the Act requires a patient to designate a primary caregiver in writing. RCW 69.51A.0101(2)(c). Phelps argues, however, that the Act requires a primary caregiver provide only some "evidence of designation" to a law enforcement officer upon request. RCW 69.51A.040(4)(c). Because Clark signed an affidavit designating Phelps as his primary caregiver on March 5, 2002, Phelps argues that the evidence was sufficient to raise affirmative defenses under the Act. We disagree.

Although the statute is silent as to when a person must produce written evidence of his primary care status, it does require a caregiver who "*has* been designated in writing by a patient." RCW 69.51A.010(2)(c) (emphasis added). The use of the past tense suggests that the patient must designate the primary caregiver before the caregiver may assist with the medical use of marijuana. Furthermore, the statute requires the caregiver to provide his authorization documents to "any law enforcement official requesting such information." RCW 69.51A.040(4). This language also suggests that the patient must designate a caregiver before the police contact that results in an arrest or seizure.

We conclude that the statute is not ambiguous as to when a patient must designate his primary caregiver. And we agree with the trial court that the designation must be made before the possession or attempted possession charge is made.

[Some text and citations omitted]

MURDER SUSPECT'S STATEMENTS TO DETECTIVES HELD TO BE VOLUNTARY
State v. Hughes, ___ Wn. App. ___, 77 P.3d 681 (Div. II, 2003)

Facts and Proceedings below:

While Portland police officers were talking to Verne Hughes about another matter, Hughes told them that he had information about a Clark County homicide of a man named McCombs. Clark County detectives then interviewed Hughes.

The Court of Appeals describes the interrogation as follows:

> [Detectives A and B] interviewed Hughes after advising him of his constitutional rights. Hughes indicated that he understood his rights and then spoke with the detectives. Hughes emphasized that he did not want to go to jail and that if he became a witness, it would be dangerous for him in jail. The detectives made no promises, but assured him that if he did go to jail, he would not be in the "general population." Hughes also asked the detectives to help him locate his children. [Detective A] agreed to help Hughes.
>
> The detectives interviewed Hughes for approximately 45 minutes and then conducted another tape-recorded interview during which Hughes gave details about McComb's death. [Detective A] again advised Hughes of his constitutional

rights during the taped interview. Hughes stated that he hoped for something less than a homicide charge, such as manslaughter, in return for his statements. The detectives did not promise him anything and released him.

[Detective A] later testified that he wanted Hughes to "stay cooperative" and that he wanted to follow Hughes's movements. He felt that he did not have probable cause to arrest Hughes because McComb's body had not been found.

[Detective A] arranged for a hotel room for Hughes and gave him about eight dollars. [Detective A] did not ask for any information in exchange for the room and money.

[Detective A] contacted Hughes several times after July 13, 2000. On July 14, Hughes showed the detective a possible location of Ambrose's baseball bat. On July 15, [Detective A] again visited Hughes to gain more information about the homicide. On July 16, [Detective A] helped Hughes release his car from police impound at no charge.

On July 18, [Detective A] met Hughes and his ex-wife, Tina Burns, at her apartment. Accompanied by Hughes's wife, the detective stayed at the apartment for approximately one hour. [Detective A] and Hughes discussed computer problems and the detective invited Hughes to church. [Detective A]'s wife begrudgingly accepted a gift from Hughes's ex-wife.

During the course of the investigation, Hughes told the detective that he was thinking of purchasing a particular handgun. Hughes asked [Detective A] to determine whether the gun was stolen, and [Detective A] complied by checking the police database.

On July 25, the police located McComb's body. On July 30, [Detective A] contacted Hughes at an Oregon highway rest stop. [Detective A] was again accompanied by his wife, who remained in the car. Hughes agreed to ride with [Detective A] to the Clark County police station for a video-taped interview.

Back in Vancouver, Hughes gave a one-and-one-half-hour video-taped interview after the detectives advised him of his Miranda rights. The interview concluded with Hughes joking that the police had promised him lunch in exchange for his testimony. After the interview, the police arrested Hughes for McComb's murder. He became emotional because he felt he was "lied to, misled, and or betrayed."

Before trial, Hughes moved to suppress his statements under CrR 3.5. In written findings of fact and conclusions of law, the trial court denied the motion to suppress statements Hughes made between July 13 and July 16, because they were not the product of implied promises or deception. The trial court then determined that the statements made after July 16 resulted from implied promises and suppressed them.

A jury convicted Hughes of second degree felony murder.

ISSUE AND RULING: Did the trial court correctly find the defendant's statements to the detectives to be voluntary? (ANSWER: Yes)

Result: Reversal (on grounds not addressed here) of Clark County Superior Court conviction of Verne McLean Hughes for second degree felony murder; remand to Superior Court to enter a verdict of guilty on the lesser included offense of second degree assault.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Hughes asserts that [Detective A] deceived him by direct or implied promises and the trial court should not have admitted his statements because the police obtained them through improper influence. . . . The trial court must look to all circumstances to see if the statements were coerced. The court can consider any promises or misrepresentations made by the interrogating officers, but it must decide whether there is a causal relationship between the promise and the statements. Thus, we determine whether the detectives' behavior overbore Hughes's will to resist and induced a "not freely self-determined" confession.
>
> The trial court found that the two July 13, 2000 interviews and other statements given up to July 16 were admissible because Hughes "made a knowing, voluntary and intelligent waiver of his rights and after July 13, 2000 he was not in custody." The court also found that after the police released his car on July 16, Hughes's later statements were made in a coercive atmosphere, requiring suppression.
>
> Hughes challenges the court's finding that "on July 13, 2000, no promises, threats or other improper inducements were offered to gain [his] waiver of rights and agreement to the interview." He also challenges the finding that he realized his criminal liability for his part in McComb's death.
>
> In his interview, Hughes indicated that he made the statements because he wanted his children back, wanted to "get on with [his] life," and did not want to break the law. And whether his statements helped him achieve that end, he wanted "things right in [his] life." . He then volunteered to show the officers the possible locations of the body and the bat. Hughes also indicated that he had some understanding of the legal implications of his involvement in the case and should be awarded immunity for his statement.
>
> [Detective A] clearly asked if Hughes was promised immunity, to which Hughes replied, "You said you will do everything you can." When asked the second time whether [Detective A] promised Hughes anything, Hughes said, "No." Next, [Detective A] asked if he coerced Hughes. The transcript indicates that Hughes's reply is indecipherable. [Detective A] testified that Hughes's response was audible and he said, "No, I know I'm just probably going to get screwed, too." Finally, Hughes indicated that he voluntarily talked to the detectives.
>
> The two July 13, 2000 interviews and the detective's testimony, believed credible by the trial court, substantially support the challenged findings, which in turn support the conclusion that Hughes voluntarily made the statements. Hughes offered information about a possible homicide hoping to make a deal, but by his own admission, no one offered him one. Hughes's argument fails.

[Citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) EXPERT TESTIMONY MATCHING SAMPLE OF DOG DNA TO SPECIFIC DOG SHOULD NOT HAVE BEEN ADMITTED BECAUSE CURRENT SCIENCE DOES NOT SUPPORT RELIABILITY – In State v. Leuluaialii, ___ Wn. App. ___, 77 P.3d 1192 (Div. I, 2003), the Court of Appeals holds that a trial court should not have admitted expert testimony matching a sample of dog DNA to a specific dog (but that the error was harmless in light of the other evidence of guilt.) The Court of Appeals summarizes its holding in the case as follows:

> The methodology and technique for extracting and identifying deoxyribonucleic acid (DNA) in plants and animals is relatively well established, as is the methodology and technique for determining the probability and extent of a relationship between two samples of human DNA, including matching the DNA of a sample to specific human being. However, the study of canine DNA has not progressed to the point of a study of human DNA sufficient to permit an expert to testify to a match between a s ample and a specific dog. It was error for the trial court to have admitted such testimony, but an error that was harmless in the context of this case [harmless because there could be no reasonable doubt in light of the other evidence of guilt – **LED Ed.**]

Result: Affirmance of King County Superior Court convictions of defendant Leuluaialii for aggravated murder in the first degree (two counts) and animal cruelty in the first degree (one count), and of defendant Tuilefano for murder in the first degree (two counts).

(2) ADULT CABARET ORDINANCE HELD CONSTITUTIONAL IN FREE SPEECH, VOIDNESS ATTACK – In Heesan Corporation v. City of Lakewood, ____ Wn. App. ____, 75 P.3d 1003 (Div. II. 2003), the Court of Appeals rejects challenges to the City of Lakewood's "Adult Cabaret Code" based on, among other theories, constitutional freedom of speech protections and constitutional due process void-for-vagueness protections.

The Lakewood ordinance prohibits employees or entertainers from exposing certain parts of their bodies, erotically touching or caressing any member of the public, performing actual or simulated sexual conduct, performing a dance fewer than four feet from any member of the pubic, and accepting tips directly from members of the public. The City of Lakewood revoked the city license of an adult entertainment business in Lakewood based on prostitution and illegal drug activity occurring on the premises. The Court of Appeals holds that: 1) the ordinance was not a prior restraint on protected speech; 2) revocation of the license was not a prior restraint; 3) the ordinance was not overbroad; 4) the ordinance was not void for vagueness; 5) the ordinance was not preempted by state statutes providing for prevention and abatement of nuisances; and 6) the ordinance was enacted in accordance with the Open Public Meetings Act.

Result: Affirmance of Pierce County Superior Court decision upholding the City of Lakewood's revocation of the adult cabaret license of the New Player's Club owned by Heesan Corporation.

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. another website for U.S. Supreme Court opinions is the Court's website at [http://www.supremecourtus.gov/opinions/02slipopinion.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since 199 can be accessed (by date of decision only) at

Easy access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2003, is at [http://slc.leg.wa.gov/]. Information about bills filed in 2003 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent WAC amendments is at [http://slc.leg.wa.gov/wsr/register.htm]. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The address for the Criminal Justice Training Commission's home page is [http://www.cjtc.state.wa.us], while the address for the Attorney General's Office home page is [http://www/wa/ago].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to [ledemail@cjtc.state.wa.us]. **LED** editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LED**'s from January 1992 forward are available via a link on the Commission's Internet Home Page at: [http://www.cjtc.state.wa.us].